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FIRST GENERAL COUNSEL'S REPORT

MUR: 6486

DATE COMPLAINT FILED: 08/10/11

DATE OF NOTIFICATION: 08/12/11

LAST RESPONSE RECEIVED: 09/21/11

DATE ACTIVATED: 09/28/11

**EXPIRATION OF SOL: 07/01/16 (earliest)/
12/31/16 (latest)**

MUR: 6491

DATE COMPLAINT FILED: 08/16/11

DATE OF NOTIFICATION: 08/19/11

LAST RESPONSE RECEIVED: 09/13/11

DATE ACTIVATED: 09/28/11

**EXPIRATION OF SOL: 07/01/16 (earliest)/
12/31/16 (latest)**

COMPLAINANTS:

James C. "Jim" Wark, Chair

Angelina (Texas) County Democratic Party

Nell Stevenson

RESPONDENTS:

Mark Hicks

JM Management

Unknown Respondents

RELEVANT STATUTES:

2 U.S.C. § 434(c)

2 U.S.C. § 441d(a)

11 C.F.R. § 100.22(a)

11 C.F.R. § 109.10

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Independent Expenditure Reports

FEDERAL AGENCIES CHECKED:

None

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I. INTRODUCTION

The nearly identical complaints in MURs 6486 and 6491 allege that two large billboard advertisements in Lufkin, Texas that expressly advocate the defeat of President Obama lack disclaimers identifying who paid for them. The complaints reference a newspaper article that identifies Mark Hicks as the billboards' owner. Hicks and his company, JM Management, ("Respondents") filed virtually identical responses, in which they refused to identify the person or persons responsible for the advertisements. Respondents maintain that the billboards are "simply a demonstration of an anonymous individual's right to express an opinion in a public format."

Based on the complaints and responses, we recommend that the Commission find reason to believe that one or more unknown respondents violated 2 U.S.C. § 441d by failing to identify who paid for the two billboards and whether a candidate authorized them. We also recommend that the Commission find reason to believe that one or more unknown respondents violated 2 U.S.C. § 434(c) by failing to report the billboards as independent expenditures. We further recommend that the Commission take no action at this time as to Mark Hicks and JM Management and authorize an investigation to determine the identity of the unknown respondents, the cost of the billboards, and whether the unknown respondents coordinated with any federal candidate.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Facts**

3 The complaints allege that the two billboards display the following advertisement:

4 MORE TAXES!
5 MORE WELFARE!
6 MORE GOVERNMENT!

7
8 VOTE OBAMA OUT!

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10 See MUR 6491 Complaint (attaching photograph). To the right of the text is a large headshot of
11 President Obama in a red circle with a red slash through it. See *id.* The billboards are located on
12 the side of a four-lane, divided highway in Lufkin, Texas. See *id.*, Attachment 1 (screenshot
13 from KTRE-TV news story, Aug. 5, 2011, available at
14 <http://www.ktre.com/story/15220045/angelina-county-anti-obama-billboards>).

15 The newspaper article attached to the complaint in MUR 6486 reports that Hicks said that
16 the billboards went up around July 1, 2011, and that the individuals paid for them to remain for
17 six months. Audrey Spencer, Anti-Obama Billboards May Violate Ad Guidelines, LUFKIN
18 DAILY NEWS, Aug. 4, 2011, at 1 (the "Lufkin News Article").¹ The Lufkin News Article further
19 attributes to Hicks the claim that the individuals who paid for the billboards wished to remain
20 anonymous, *id.*, a position consistent with the Respondents' subsequent response. Finally, the
21 complaints allege that the billboards lack disclaimers identifying who paid for them, in violation
22 of the Federal Election Campaign Act of 1971, as amended (the "Act"). Complaints at 1.

23 Respondents deny that a violation occurred and maintain that the billboards are "simply a
24 demonstration of an anonymous individual's right to express an opinion in a public format
25 without subjection to harassment." See MUR 6486, Hicks & JM Management, Response at 1.

¹ President Obama declared his candidacy for the 2012 Presidential election on April 5, 2011.

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1 Respondents maintain that the statement on the billboards does "not call for an endorsement of
2 *another* person who might seek the political office in question; it simply states a belief that Mr.
3 Obama should not be re-elected." (emphasis in original). Finally, Respondents contend that,
4 "[u]nder our Constitutionally-protected rights to free speech, this [anonymous] individual should
5 be allowed to implore his or her fellow citizens to visit the polls and lawfully remove any current
6 office-holder whose actions are deemed unacceptable." *Id.*

7 **B. Legal Analysis**

8 **1. The Billboards Lack Required Disclaimers**

9 The Act requires that whenever a political committee makes a disbursement for the
10 purpose of financing any communication through any outdoor advertising facility or any other
11 type of general public political advertising, or whenever any person makes a disbursement for
12 the purpose of financing communications expressly advocating the election or defeat of a clearly
13 identified candidate, such communication must include a disclaimer. 2 U.S.C. § 441d(a); 11
14 C.F.R. § 110.11. The communication must disclose (i) who paid for the communication;
15 (ii) whether it was authorized by a candidate, an authorized political committee of a candidate, or
16 its agents; and (iii) if not authorized by the candidate, its political committee, or agent, the name,
17 address, phone number, or web address of the person who paid for the communication, as well as
18 the fact that the communication was not authorized by any candidate or authorized committee of
19 a candidate. 2 U.S.C. § 441d(a)(1)-(3). The payment, authorization, and identification
20 information must be printed in a box in sufficiently sized type and with adequate color contrast.
21 2 U.S.C. § 441d(c).

22 Under the Commission's regulations, a communication contains express advocacy when,
23 among other things, it uses phrases such as "vote against Old Hickory," "defeat" accompanied by

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1 a picture of a candidate, or "reject the incumbent," or uses campaign slogans or individual words
2 that in context can have no other reasonable meaning than to urge the defeat of a clearly
3 identified candidate. 11 C.F.R. § 100.22(a).

4 The disclaimer requirements of 2 U.S.C. § 441d(a) apply to the billboards. They are
5 "outdoor advertising facilities" and/or "general public political advertising" and they contain
6 express advocacy. The phrase "Vote Obama Out!" expressly urges President Obama's defeat.
7 11 C.F.R. § 100.22(a). In addition, the billboards contain a picture of President Obama inside a
8 red slash, graphically urging the defeat of President Obama. *Id.* Thus, regardless of whether a
9 political committee or a person paid for and disseminated the billboard advertisements, the signs
10 should have contained disclaimers.

11 Respondents, who admit only to owning the billboards, rely on the First Amendment and
12 "an anonymous individual's right to express an opinion in a public format." That reliance is
13 misplaced. In an unbroken line of cases beginning with *Buckley v. Valeo*, 424 U.S. 1, 66 (1976),
14 and ending most recently in *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010), the Supreme
15 Court has expressly held that disclaimer requirements for campaign spending and advertisements
16 related to federal elections do not offend the First Amendment. *See also McConnell v. FEC*,
17 540 U.S. 93, 196-97 (2003) (upholding disclaimer requirements for electioneering
18 communications).

19 The Court's decision in *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995), is
20 not to the contrary. *McIntyre* recognized a First Amendment right to anonymous speech only
21 where it related to "referenda or other issue-based ballot measures," and where the nature of the
22 speech – such as a pamphlet – was so personal as to "reveal[] unmistakably the content of her
23 thoughts on a controversial issue." *Id.* at 355; *see also, Public Citizen v. FEC*, 268 F.3d 1283,

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1 1288-89, 1291 (11th Cir. 2001) (distinguishing *McIntyre* and upholding 2 U.S.C. § 441d(a)(3)'s
2 candidate authorization provision as applied to independent expenditures); *Kentucky Right to*
3 *Life v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997) (distinguishing *McIntyre* and upholding
4 Kentucky's identification disclaimer for independent expenditures). *Cf. FEC v. Survival*
5 *Education Fund*, 65 F.3d 285, 296-97 (2d. Cir. 1995) (distinguishing *McIntyre* and upholding
6 2 U.S.C. § 441d(a)(3)'s application to solicitations, not independent expenditures, as
7 constitutionally valid).

8 In refusing to reveal the ad sponsors, Respondents cite the right to exercise anonymous
9 speech "without subjection to harassment." Reading the response expansively, it could be read
10 to claim that the billboards lacked a disclaimer because the sponsors feared harassment as a
11 consequence of their expressed view on President Obama. But such a bare claim, without more,
12 obliquely raised by a third party on behalf of unidentified speakers, falls far short of overcoming
13 the disclaimer obligations prescribed in the Act and Commission regulations.

14 The Supreme Court has held that, to avoid disclosure, speakers must "show 'a reasonable
15 probability that the compelled disclosure of personal information will subject them to threats,
16 harassment, or reprisals from either Government officials or private parties.'" *Doe v. Reed*,
17 130 S. Ct. 2811, 2820 (2010) (emphasis added) (internal citations omitted) (quoting *Buckley*, 424
18 U.S. at 74 (citing *Citizens United v. FEC*, 130 S. Ct. at 915)) (rejecting facial challenge to state
19 law requiring disclosure of petition signatures). "The proof may include, for example, specific
20 evidence of past or present harassment of members due to their associational ties, or of
21 harassment directed against the organization itself. A pattern of threats or specific
22 manifestations of public hostility may be sufficient." *Buckley*, 424 U.S. at 74.

1 Here, Respondents utterly fail to make the required showing. In fact, they make no
2 showing of a "reasonable probability of harassment" of the third-party ad sponsors. At the
3 threshold, to consider whether the sponsors' effort to avoid the disclaimer requirements set forth
4 in Section 441d(a)(3), Respondents must present *some* factual basis for such a claim. *See Brown*
5 *v. Socialist Workers '74 Campaign Committee (OHIO)*, 459 U.S. 87, 98-100 (1982) (noting
6 evidence presented to district court included pattern of "threatening phone calls and hate mail,
7 the burning of SWP literature, the destruction of SWP members' property, police harassment of a
8 party candidate, and the firing of shots at an SWP office"); *FEC v. Hall-Tyner Election*
9 *Campaign Committee*, 678 F.2d 416, 423 (2d. Cir. 1982) ("When fear of injury that is neither
10 imagery [*sic*] nor speculative discourages the exercise of valued and revered First Amendment
11 rights, courts must intercede."); *see also Doe v. Reed*, __ F. Supp. 2d __, 2011 WL 4943952, at
12 17 (W.D. Wash. Oct. 17, 2011), *appeal docketed*, No. 11-35854 (9th Cir. Oct. 18, 2011)
13 (rejecting as-applied challenge to state law requiring disclosure of petition signatures because
14 evidence of threats, harassment, or reprisals did not satisfy "reasonable probability" standard);
15 *ProtectMarriage.com v. Bowen*, 399 F. Supp. 2d 1197, 1216-18 (E.D. Cal. 2009) (concluding
16 that even "vandalism, protests that at times turned violent, and the threat of injury, up to and
17 including one death threat" failed to satisfy "reasonable probability" standard).

18 Here, Respondents have proffered *no* facts supporting a reasonable possibility that the ad
19 sponsors could be subject to harassment if their identities are disclosed. They fail even to
20 identify the type of harassment that might be directed at the third-party sponsors that they seek to
21 shield from the Act's disclosure requirements. If, however, Respondents – or preferably the ad
22 sponsors themselves – can make a concrete and credible showing of a reasonable probability of
23 harassment during our investigation, we of course will consider it at that time.

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1 The Commission generally has pursued enforcement in express advocacy disclaimer
2 cases that may result in a civil penalty greater than \$1,000. See MUR 5024R (Council for
3 Responsible Government) (\$5,500 civil penalty for two House race brochures with a partial
4 disclaimer); MUR 4759 (Malooof) (\$7,500 civil penalty for 108,000 flyers, 30 outdoor signs, and
5 3,000 fundraising invitations that lacked disclaimers);² MUR 4811 (Spratt) (\$2,000 civil penalty
6 for yard and road signs); see also MUR 6317 (Utah Defenders of Constitutional Integrity)
7 (Commission authorized pre-probable cause conciliation and \$1,400 civil penalty in case
8 involving political committee status, reporting, and disclaimer violations on 2,000 mailers).

9 In contrast, the Commission has not pursued enforcement in express advocacy disclaimer
10 matters where the apparent cost of the communications generated a civil penalty below \$1,000 or
11 where the respondents took prompt corrective action. See MUR 6404 (Stutzman) (Commission
12 dismissed as to billboard and found no reason to believe as to three road signs estimated to cost
13 less than \$2,000 and displayed for one month); see also MUR 6378 (Conservatives for Congress)
14 (EPS) (billboard owner affixed disclaimers on three billboards a few days after receiving
15 complaint; reminder letter sent); MUR 6118 (Roggio) (EPS) (billboards with partial disclaimer
16 that were quickly fixed; caution letter sent).

17 Here, an investigation is clearly warranted. First, there are no disclaimers on the
18 billboards, the payor's identity is not obvious, and there is no information that corrective
19 disclaimers have been added to the billboards since the complaints were filed. Second, the
20 billboards clearly contain express advocacy. Third, we expect the cost of two large billboards on

² The Malooof case also involved a failure to file a Statement of Candidacy violation.

1 display for six months likely suffices to justify the use of Commission resources.³ Fourth, and
2 finally, Respondents know who paid for the ads and what they cost. Unlike in other matters
3 where the information in the complaint was so lacking as to prevent the Commission from
4 naming a respondent,⁴ here there is a high likelihood of identifying and locating the responsible
5 party or parties in this case.⁵

6 Accordingly, we recommend that the Commission find reason to believe that unknown
7 respondents violated 2 U.S.C. § 441d(a) by failing to include a disclaimer on two billboards
8 advocating the defeat of a federal candidate. We also recommend that the Commission take no
9 action at this time as to Mark Hicks and JM Management. Although there is no information that
10 they are responsible for the advertisements, their responses leave open the possibility that they
11 may have been involved with the content or funding of the billboards. We expect to be able to
12 make an appropriate recommendation as to Mark Hicks and JM Management after a short
13 investigation.

14 **2. The Billboards Should Have Been Disclosed as Independent**
15 **Expenditures**

16
17 As a direct consequence of a finding that there is reason to believe the billboards may
18 constitute a violation of the disclaimer regulations, so too there would be reason to believe that

³ While there is no information about the amounts paid for these billboards or the charges for billboard displays, an Internet search revealed that a large, national company would typically charge \$1,150 for two similarly sized billboards in Lufkin, Texas for a four-week period. See www.lamaroutdoor.com. Thus, the display cost for six months may have been approximately \$6,900, not including production costs, an amount that is significantly higher than the cost in a recent comparable matter in which the Commission did not pursue the respondents. See MUR 6404 (Stutzman) (the amount in violation was likely less than \$2,000).

⁴ See MUR 5455 (Unknown in South Dakota) (EPS) ("without the last four digits of the phone number where the calls emanated from it was unlikely that an investigation would ultimately reveal the source of the calls"); see also MUR 6135 (Unknown Respondents) (EPS) (dismissing for prosecutorial discretion where OGC unable to identify any individual associated with phone calls).

⁵ We note also that in MUR 6429 (Unknown Respondents), the Commission voted 2-3 against a recommendation to investigate to learn the type of entity that paid for mailers and phone calls critical of a House candidate to determine if disclaimers were needed. In the instant case, the message on the billboards is clearly express advocacy, making the need for disclaimers obvious regardless of the type of entity that paid for them.

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1 the expenditures associated with the billboards should have been disclosed as independent
2 expenditures. The Act provides that "every person (other than a political committee) who makes
3 independent expenditures in an aggregate amount or value in excess of \$250 during a calendar
4 year" must file a statement disclosing information about the expenditures. 2 U.S.C. § 434(c)(1);
5 11 C.F.R. § 109.10(b). Among other things, the statement must disclose the identity of each
6 person who made a contribution in excess of \$200 for the purpose of furthering the reported
7 independent expenditure, whether the independent expenditure supports or opposes the candidate
8 involved, and whether it was coordinated with any candidate. 2 U.S.C. § 434(c)(2); 11 C.F.R.
9 § 109.10(e).

10 In his response and as quoted in the Lufkin News Article, Hicks claims that the billboards
11 were financed by an individual or individuals. Further, it appears likely that the signs cost more
12 than \$250. Accordingly, there is reason to believe that the payments for the billboards should
13 have been disclosed as independent expenditures.

14 Although this allegation was not specifically raised by the complainants, it flows directly
15 and unavoidably from the nature of the communication described in the complaints as express
16 advocacy and as identified in the attached photograph of the billboards. Therefore, we
17 recommend that the Commission also find reason to believe that unknown respondents violated
18 2 U.S.C. § 434(c) by failing to file an independent expenditure report.

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IV. RECOMMENDATIONS

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1. Find reason to believe Unknown Respondents violated 2 U.S.C. § 441d.

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2. Find reason to believe Unknown Respondents violated 2 U.S.C. § 434(c).

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3. Take no action at this time as to Mark Hicks and JM Management.

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4. Authorize the use of compulsory process in this matter.

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5. Approve the appropriate letters.

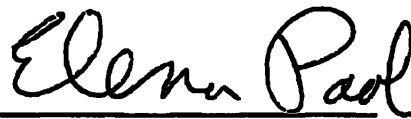
Anthony Herman
General Counsel

03/19/12
Date

BY:


Daniel A. Petalas
Associate General Counsel for Enforcement


Roy Q. Lockett
Acting Assistant General Counsel


Elena Paoli
Attorney

Attachment

1. Photograph of billboard and highway

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